NO. 87-1947

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LOUIS VITALE, GRACE VITALE AND ANGELO VITALE

Petitioners

BENSON A. SNAIDER, GERALD H. COOPER, WILLIAM F. GALLAGHER, ALLSTATE INSURANCE COMPANY, ANDREW P. NEMIROFF AND JOHN DOE INSURANCE COMPANY

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT OF THE CASE

Plaintiffs, proceeding pro se, brought this action alleging various violations of their constitutional rights in connection with a series of state court proceedings. The named defendants are all attorneys and/or parties involved in the state court cases. The plaintiffs have petitioned for a Writ of Certiorari following the affirmance by the Second Circuit Court of Appeals of a ruling by Judge Ellen Bree Burns of the District of Connecticut which granted motions to dismiss filed by defendants Benson A. Snaider, Andrew P. Nemiroff, Gerald H. Cooper and Allstate Insurance Company.

The pertinent facts as alleged in the complaint are as follows. On May 9,

1980, the plaintiffs were involved in an automobile accident in Bridgeport, Connecticut. Plaintiffs Grace and Angelo Vitale were passengers in a motor vehicle driven by plaintiff Louis Vitale. Shortly thereafter, Attorney Benson A. Snaider was retained by the plaintiffs to represent them in a personal injury action brought against the driver of the other vehicle, Ms. Diane M. Koty.

On February 11, 1981, plaintiffs asserted a cause of action against Ms. Koty in a three count complaint drafted by Attorney Snaider, Vitale, et al. v. Koty, New Haven Superior Court, Docket Number 190929. Defendant Gerald H. Cooper was retained by defendant Allstate Insurance Company to represent Ms. Koty. Shortly after the trial

began, on October 16, 1984, the third count of the complaint stating a cause of action for Louis Vitale was withdrawn. A jury trial was held and verdicts were rendered on October 17, 1984 against plaintiffs Grace and Angelo Vitale. Attorney Snaider was permitted to withdraw from Vitale, et al. v. Koty. A plethora of pro se post-trial motions was filed by the various plaintiffs, all of which were eventually denied or dismissed.

Plaintiffs took a pro se appeal of Vitale, et al. v. Koty to the Connecticut Appellate Court. Defendant William F. Gallagher was retained by Defendant Allstate Insurance Company to represent Ms. Koty in the appellate proceedings. On June 6, 1985, the Connecticut Appellate Court dismissed

the appeal of Vitale, et al. v. Koty.

Plaintiffs filed motions with the Connecticut Appellate Court to reargue the dismissal of their appeal of Vitale, et al. v. Koty. Plaintiffs Grace and Angelo Vitale asserted violations of their due process and equal protection rights under the United States Constitution and the Connecticut State Constitution. Plaintiffs' motions to reargue were denied on July 10, 1985.

On November 19, 1985, plaintiffs filed a pro se malpractice and fraud complaint against defendant Snaider in the Connecticut Superior Court for the Judicial District of New Haven at New Haven, Vitale, et al. v. Snaider, Docket Number CV 85-0241362. Attorney Andrew P. Nemiroff, also a defendant in the present action, was retained to

represent defendant Snaider.

Verdicts were returned in the state court action for defendant Snaider on all counts on October 6, 1986 after a twenty-one day trial. On October 8, 1986, plaintiffs filed a combined Motion to Set Aside the Verdict, Petition for a New Trial, and Motion for Costs, all of which were denied.

On October 16, 1986, plaintiffs filed the instant federal litigation, Vitale, et al. v. Snaider, et al., Civil Action N-86-362, in the United States District Court for the District of Connecticut alleging the same facts and seeking the same relief as in the state court action. The complaint asserts that the named defendants conspired with various judicial officers in the course of the state court proceedings to deny

plaintiffs due process and equal protection.

On July 23, 1986, Judge Burns granted motions to dismiss filed by defendants Benson A. Snaider, Andrew P. Nemiroff, Gerald H. Cooper and Allstate Insurance Company, holding that the plaintiffs failed to state a cause of action under §§1983, 1985(3) and 1986 of the Civil Rights Act. Judgment entered in favor of the defendants, and plaintiffs then filed an appeal to the Second Circuit Court of Appeals.

On February 19, 1988, the Second Circuit Court of Appeals affirmed Judge Burns' ruling, substantially for the reasons stated in Judge Burns' Ruling on Motion to Dismiss. Plaintiffs then filed the instant petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THE DECISIONS BELOW NEITHER CONFLICT WITH DECISIONS OF THIS COURT NOR CREATE A CONFLICT AMONG THE CIRCUITS

It is axiomatic that a petition for certiorari will not be granted merely on a showing that the decision of the court below was incorrect:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgmts.'... If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and

> statutory responsibilities placed upon the Court.
>
> Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi, reprinted in Stern and Gressman, Supreme Court Practice, at pp. 258-59 (5th ed. 1978).

In the same vein, Chief Justice Taft observed:

> The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.
>
> Magnum Co. v. Coty, 262 U.S. 159, 163 (1923).

See also Dick v. New York Life Insurance Company, 359 U.S. 437, 452-55 (1959) (Frankfurter, J., dissenting). These sentiments have now been codified in Rule 17 of the Supreme Court Rules,

which stipulates that a review on writ of certiorari "is not a matter of right," and will be granted "only where there are special and important reasons therefor."

In addition to re-arguing the merits, the present petitioners have urged two reasons for granting the writ. They claim that the decisions below are inconsistent with decisions of this Court (1) securing Fourteenth Amendment Rights to due process and equal protection and (2) involving interpretation of "under color of state law and state action." Both of these claims are without merit, and the petition should be denied.

I

Where a petition for a writ of certiorari is sought on the ground of

conflict between the circuits or between the lower court opinion and an opinion of the Supreme Court, the petitioner must demonstrate that there is a "real conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Stern and Gressman, Supreme Court Practice, op cit. at 264. Where the alleged conflict is not a true conflict on precisely the same question, the petition for certiorari is "but one way of saying that the decision below is wrong in light of general principles." Id. at 265. This is not a sufficient reason for granting the writ. Indeed, the Court will dismiss a writ of certiorari as improvidently granted where subsequent examination reveals that the alleged conflict did not in

fact exist. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 392-93 (1923); Keller v. Adams-Campbell Co., 264 U.S. 314, 319-20 (1924); Wisconsin Electric Co. v. Dunmore Co., 282 U.S. 813, 813 (1931); Sanchez v. Borras, 283 U.S. 798, 799 (1931).

To warrant the issuance of a writ of certiorari, the claimed conflict must be a direct one:

> Lawyers, of course, are likely to regard any case they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine; that is what makes the ruling below "erroneous." But such a loose reading of the [Rule 17] concept of a decision "in conflict with applicable decisions of this court" does not satisfy the Supreme Court's understanding of what constitutes a conflict, and will not be sufficient to obtain a grant of certiorari. A true conflict, in other words, must be direct and irreconcilable, and must be demonstrably so.

Stern and
Gressman, op cit.
at p. 273.
(emphasis supplied).

This requirement of a direct conflict has become even more stringent under the present Supreme Court Rules. While the former Rule 38(5)(b) required only a showing that the decision of the Court of Appeals was "probably" in conflict with a Supreme Court opinion, the present Rule 17.1(c) has eliminated the word "probably." It is evident from the cases cited in their petition that petitioners have failed to meet this exacting standard.

Petitioners have in no way explained how the decisions below are in conflict with the cases cited in their brief, nor have petitioners elaborated in any way

on the facts or the law of those cases.

Even a cursory review of the cases cited by the petitioners in support of their argument that the decisions of the courts below are in conflict with decisions of this Court demonstrate the absence of any direct conflict. The cases cited at pages 12-13 of the petition are not in conflict with the decisions below.

Betts v. Brady, 316 U.S. 455 (1941) is cited on page 12 of petitioners brief for the proposition that due process is denied if a trial is conducted in such a manner that it is shocking to "the universal sense of justice or offensive to the common and fundamental ideas of fairness and right." Id., at 475. Nothing in the decisions below is in conflict with the general principle

cited by petitioners, which comes from a dissenting opinion by Justice Hugo Black in a case involving the right of an indigent criminal defendant to state-appointed counsel.

Petitioners incorrectly and without elaboration state that Tower v. Glover, 467 U.S. 914 (1984) presents the same issues as the case at bar. Tower v. Glover held that a complaint adequately alleges "state action" by allegations of conspiracy between state officials and state-appointed public defenders. Id., at 920. Judge Burns' decision below held, inter alia, that private counsel do not act "under color of law within the meaning of the Civil Rights Act" in their capacity as representatives of clients in court. First, such a holding is not in conflict with Tower v.

Glover. Second, Judge Burns' decision also held that petitioners' complaint failed to allege any deprivation of a constitutional right. Petitioners' Appendix B, at 5b. Third, the Second Circuit Court of Appeals held that petitioners' "[d]iffuse and expansive allegations" are insufficient to state a cause of action for conspiracy, and "merely chronicle state court rulings and findings that were adverse to plaintiffs' interest." Petitioners Appendix C, at 2c.

Accordingly, the petitioners have failed to demonstrate any conflict between the decisions by Judge Burns and the Second Circuit below and the decisions of this Court. Therefore, the petition should be denied.

II. THE PETITION DOES NOT PRESENT ISSUES OF NATIONAL IMPORTANCE

Even if there were a "true" conflict in the present case, that does not guarantee that the Court will issue the writ:

> The Court as a whole now seems committed to giving the existence of a conflict less than decisive weight.
>
> * * *
>
> The importance and recurring nature of the issue in conflict often plays a decisive role in the grant or denial of certiorari.
>
> Stern and Gressman, op cit. at 269-70

Thus Chief Justice Vinson admonished:

> To remain effective the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.
>
> Address of Chief Justice Vinson

before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi, reprinted in Stern and Gressman, op cit. at 259. (emphasis supplied).

Petitioners have not even attempted to argue that the issues raised in the present case meet Chief Justice Vinson's test. In assessing the national significance of the present petition, it must be emphasized that petitioners are merely rearguing the merits of their original and legally insufficient complaint dismissed in the Federal District Court below. There is no issue of national significance which will have immediate importance beyond the facts and parties involved here.

Petitioners assert that they have been denied their day in court. A

review of the events leading up to this petition reveals that petitioners have already had their day in court. Indeed, petitioners kept the defendant Benson Snaider in court throughout a 21 day trial. Plaintiffs' present petition amounts to nothing more than an attempt to re-try the issues decided in that state court action. That is clearly not the purpose of the writ of certiorari.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June ~~24~~ 22, 1988